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No. 83-1163

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD A. LOSS III,

Appellant,

vs.

THE SUPREME COURT OF ILLINOIS and
THE ILLINOIS STATE BOARD OF LAW EXAMINERS,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

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Date Completed: November 13, 1987

QUESTIONS PRESENTED

1. Whether the Illinois Supreme Court's bar admission rule, which allows that court unlimited discretion to selectively review any case of a bar applicant who had previously been judged fit for admission, is unconstitutional because that rule:

   a. fails to provide procedural due process safeguards to protect the rights of the bar applicant; i.e. no right to a hearing, no right to notice, no right to confront, and no standards or criteria for selection of which cases are to be reviewed;

   b. requires, by its *ad hoc* nature, that such a review must be triggered by the court's participation in private communications and *ex parte* judicial proceedings; and

   c. requires that the court must bring its own appeal and then judge it.

2. Whether the Illinois Supreme Court deprived Appellant of due process and equal protection of the law when, for the first time in Illinois history, it deprived an applicant of admission to the bar after he had satisfied all the requirements set forth in the court's own rules; which deprivation was contrary to the court's own rule that upon certification the applicant "shall thereafter be entitled to admission to the bar."

3. Whether the court violated Appellant's due process and equal protection rights when it, without notice:

   a. engaged in "informal communications" and *ex parte* judicial determinations nullifying the bar applicant's fitness certification by the Character Committee;

   b. opened its own review of a final determination by its own administrative agency and then judged it;

   c. created a new and higher burden of proof for fitness contests and then retroactively applied that burden to Appellant's case; and

   d. created a new rule allowing itself to make *ad hoc* reviews of fitness certifications and then retroactively applied that new rule in Appellant's case.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The majority, dissenting and specially concurring opinions of the Illinois Supreme Court are not yet reported and are printed in the Appendixes of this Petition (Apps. A & B respectively, infra).

*Rule 28.1 does not apply here.

JURISDICTION

On August 17, 1987 the Illinois Supreme Court issued a final judgment in which it denied the Appellant admission to the Illinois Bar. (App. A, infra, A1-15). A timely Motion to Stay the Mandate was filed. (App. C, infra, C1) A notice of appeal to this Court was filed on October 13, 1987. (App. D, infra, D1) This appeal is filed within 90 days of the judgment of the Illinois Supreme Court.

The jurisdiction of this Court rests on 28 U.S.C. 1257(2) which authorizes a direct appeal from a final judgment of a state court which formulated, construed and applied court rules governing bar admissions in a manner that was repugnant to the due process and equal protection clauses of the United States Constitution. Where legislation is repugnant to the Constitution on its face or by application, this Court may invoke review. *Dahnke-Waller Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Staub v. Baxley*, 355 U.S. 313 (1958); *Standard Oil v. Johnson*, 316 U.S. 481 (1942); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Shaffer v. Heitner*, 433 U.S. 186 (1977). Court rules and orders that are legislative in character fall under the purview of 28 U.S.C. 1257(2). See *Atchinson T. & S. F.R. Co. v. Public Utilities Comm'n.*, 346 U.S. 346 (1953); *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Mayer v. City of Chicago*, 404 U.S. 189 (1973); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); and *In re Primus*, 436 U.S. 412 (1978).

* * * *

Alternatively, this appeal may be treated as a petition for a *writ of certiorari* as authorized by 28 U.S.C. 1257 (3) & 28 U.S.C. 2103. A *writ of certiorari* may also lie under United States Supreme Court Rule 17(1)(c) which provides that this court may in its discretion invoke its supervisory powers where a conflict arises between a decision of this Court, *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963) and a state court decision.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part that:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * * .

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which * * * shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Edward A. Loss III, Appellant, met all of the academic and fitness requirements set forth by the Illinois Supreme Court Rules and Character and Fitness Committee's Rules of Procedure. Nevertheless, he was denied admission to the bar by order of the Illinois Supreme Court on August 17, 1987.
(App. A, *infra*, A1)

The Certification Process

1. The admissions process for the Appellant began 33 months earlier on November 21, 1984, when he submitted a bar application with extensive appendixes to the Committee on Character and Fitness. In it he revealed in candid detail his sordid past life of drug addiction and petty crimes. (App. A, *infra*, A2-4)

2. On April 25, 1985, a three person inquiry panel of the character and fitness committee reviewed the application and interviewed Appellant and they referred the matter for hearing, saying that the applicant's life is a story of drugs and alcohol addiction and a criminal lifestyle from about 1970 to 1975, a fugitive status with alcohol addiction from 1975 to 1980, and apparent rehabilitation. (See App. A, *infra*; see also, Comm. rule 4.4)

3. On November 18, 19 & 20, 1985, an extensive hearing was conducted by the character and fitness committee's seven member hearing panel. (See Comm. rules 5.1—5.6) Appellant presented 15 witnesses, hundreds of exhibits and numerous character witness affidavits supporting him. The supportive evidence indicated that Appellant was an excellent student and fully rehabilitated. A Federal District Court Judge, who was a past chairman of the character and fitness committee, told the committee that Appellant had externed in his court for two semesters, that he was highly intelligent and eminently fit and rehabilitated. Other witnesses who told the committee that the appellant was highly qualified despite his past misconduct were: a law school dean who was a sitting member of the attorney registration and disciplinary commission; Appellant's law review professor; a federal magistrate who taught appellant's legal ethics class; fellow law students who he voluntarily tutored, including a quadrapalegic; officers in social service foundations who referred exconvicts and drug addicts to Appellant who would give them employment in his moving company; and exconvicts and drug addicts who Appellant helped rehabilitate, one of whom became his business partner. (See App. A, *infra*, A2-4)

4. The Committee appointed the legal staff of the Attorney Registration and Disciplinary Commission ("ARDC") "to prepare and present the matters adverse to the Applicant". (Comm. Rule 5.3) The ARDC thoroughly investigated Appellant's background by the issuance of subpoenas, production requests, review of records, depositions and witness interviews. However, at the hearing the ARDC primarily relied upon: (1) the adverse information that the Appellant had revealed in his bar application; (2) omissions in his law school application in 1980; and (3) some inconsistencies in his testimony before the committee. Not a single witness testified against Appellant's certification.

5. Nearly three months later, February 17, 1986, Appellant received written notification from the secretary of the character and fitness committee that he was certified and that in 10 days he would would be notified about "the procedure for being sworn in at the earliest date". (App. F, *infra*, F1)

Post Certification Proceedings

6. The Illinois Supreme Court Rules provide that upon certification by the character and fitness committee an applicant "shall thereafter be entitled to admission to the bar" and the Board of Law Examiners "shall certify to the court that such applicant is qualified for admission". 110 A *Illinois Revised Statutes* 704 & 708. However, the Appellant was never sworn in. Instead, certain *ex parte* proceedings occurred among members of the Illinois Supreme Court, the Illinois Board of Law Examiners and the Character and Fitness Committee to the exclusion of Appellant and without notice to him. The exact times of these events is unknown to Appellant; however, they occurred between the date of notice of certification, February 17, 1986, and the date of the Supreme Court's extraordinary order of review, June 4, 1986. (See Apps. E & F, *infra*)

7. According to information revealed by Justice Simon in his dissent, the certification of the Appellant must have come to be known by the Supreme Court through an "informal communication". (App. A, *infra*, A11) Appellant received no notice of any such communication and was not afforded an opportunity to be heard upon it.

8. Thereupon, the court decided to negate the Appellant's certification by the character and fitness committee because court rules require that the "committee" must certify, meaning the entire 27 member committee and not a seven member subcommittee thereof. (App. B, *infra*, B3) The Appellant received no notice of the decision to void the first certification and he was not given an opportunity to be heard upon it.

9. After the first certification by the seven member hearing panel was rejected, the high court ordered the entire 27 member character and fitness committee for the First District to make a determination upon Appellant's certification. (App. B, *infra*, B3-4) Again, the Appellant received no notice of the Court's order for a second determination and he was not heard upon it.

10. Thereupon, the entire 27 member character committee considered the issue of the certification of Appellant sometime in

April, 1986. (App. B, *infra*, B3-4) The Appellant received no formal notice of this and he was given no opportunity to be heard upon it.

11. However, the character and fitness committee voted to certify the Appellant. (App. B, *infra*, B3-4) But this second certification was also negated by the Illinois Supreme Court because the court reasoned that the committee violated its rules because some of of the voting "must have been by telephone". (App. B, *infra*, B3-4) Again, Appellant had no notice of this decision and was not afforded an opportunity to be heard.

Ad Hoc Review

12. On June 4, 1986, the Illinois Supreme Court issued an extraordinary order to hear or review the case:

> It appearing to the Court that the Character and Fitness committee for the First District, under Rule 708, filed with the Board of Law Examiners, a statement certifying that Edward Loss III is in its opinion of good moral character and general fitness to practice law and that the Board of Law Examiners recommended to the Court that said Edward Loss III be admitted to the bar of Illinois, the Court, upon review of *the extraordinary circumstances brought out at* the hearing before the Character and Fitness committee, is unable to say that Edward Loss III has satisfactorily established that he is of good moral character and general fitness.
>
> *The Court cannot abdicate its responsibilities regarding admission to the bar.* Leave is given said Edward Loss III to file not later than June 16, 1986, a petition for admission to the bar of Illinois, addressing the question of character and fitness.
>
> ...[T]he Attorney Registration and Disciplinary commission shall... file a response to the aforesaid petition not later than June 23, 1986.

> Oral argument on the petition shall be held June 25, 1986...

(App. E, *infra*, E1)

Appellant had no notice of the *ex parte* proceedings leading up to this Order until Mr. Justice Ryan issued a specially concurring opinion in this case on September 2, 1987.

13. Mr. Justice Simon issued a strongly worded dissent to the June 4, 1986 Order. He declared that the court violated its own long standing court rules which provided that upon certification the applicant is "qualified for admission" and "entitled to admission". He argued that the court's own rules made no provision for the review of committee certifications and, to the contrary, only provided for review where a certification is denied through an "arbitrary refusal". He cautioned:

> If the court wishes to change its rules to permit such a review, it may do so in the customary manner. What it may not do, however, is ignore its rules and all previous case law in this single case, after the candidate has completed the application process and the Committee and the Board have discharged their duties under the existing rules. Failure to follow these rules offends the very concept of fair play, and this due process cannot countenance.

(App. E, *infra*, E 5)

14. Petitioner, having no notice of the *ex parte* proceedings leading up to the June 4, 1986 order, filed a motion to vacate the June 4, 1986 order which was later incorporated into his appeal brief to the court. He argued that (1) no appeal "of record" was brought; (2) the court violated its own rules which vested Petitioner with an entitlement to admission; (3) there were no procedural safeguards governing this unprecedented procedure whereby a court decided to bring its own appeal and then hears it; (4) the Appellant had no notice of the exact nature of

these extraordinary proceedings, nor knowledge of his procedural rights, duties, burdens and the substance of the accusations against his character.

15. In his brief to the court, the Appellant added that the Illinois court's initiation of its own *ad hoc* review on a selective basis was contrary to the express language of its own rules and constituted a fundamental denial of due process and equal protection. The Appellant queried, who would be the proper party to bring "extraordinary circumstances" of an individual case to the attention of the court? How would it be brought? To whom on the court would it be brought to? Would a certified applicant have a right to be heard before the court agrees to review the committee's decision? Is there a time limit or could certification questions be raised at any time? Would the applicant be entitled to a finding of fact? Although the court rules provided procedural safeguards for those denied a certification, it was argued, there were no such rules for certified applicants selected for review on an *ad hoc* basis.

16. On August 1, 1987, exactly 16 days before the court issued its majority opinion in this case, it amended Rule 708 (c), to say that where an applicant is certified by the character and fitness committee the applicant shall thereafter be admitted to the bar "unless the court orders otherwise". This amendment formalized the *ad hoc* rule of the Loss case. (App. F, *infra*, F3)

Mr. Justice Simon dissented to the rules change. He said the that the rule provided no explanation of the circumstances that would justify the court's selection for review of only one of the thousands of certifications made each year in Illinois. Simon concluded:

> [The] character review process, which must, of course, be searching, should not be turned into a witch-hunt with this court acting as both denouncer and jury.

(110A *Illinois Revised Statutes* 708 (eff. Aug. 1, 1987; Justice Simon dissenting)

17. On August 17, 1987, 33 months after the Appellant filed his bar application, the Illinois Supreme Court filed a majority opinion which denied him admission to the bar. Mr. Justice Goldenhersh wrote for the majority saying that, although the applicant was candid and his credentials were impressive, the court felt that there were inconsistencies in his testimony before the Committee and that the evidence, therefore, was not "clear and convincing" as to rehabilitation. (App. A, *infra*, A4-6) The court reasoned that, notwithstanding the "unfortunate language" of its own rules, certifications are merely advisory and the court never intended to abdicate its inherent authority to decide bar admission certifications. (App. A, *infra*, A5)

The court stated that the Appellant may reapply for admission at any time. (App. A, *infra*, A8)

18. Justice Simon dissented. He said that Loss was highly qualified (See App A, *infra*, A14-15) and he accused the court of a number of due process and equal protection violations.

> [The Supreme Court] failed to advise Loss of how this matter even came before us. Nothing in the record indicates the source of the information which triggered this extraordinary proceeding. Such review has not taken place—in even a single instance—since I have been a member of this court. Moreover, as the majority concedes, there are no formal procedures for keeping the court apprised of an applicants interaction with the Committee on Character and Fitness. (See Slip op. at 3-4) The only way this court could have been advised of Loss' situation, therefore, was through an *informal communication*. The possibility that this unusual proceeding was initiated on the basis of rumors or gossip turns the entire admission process into a sham. It appears that those who can grab the court's ear and are displeased with an applicant can trigger an additional inquiry, by this court itself, into the applicant's moral character. To adequately address the question of his good character and

> fitness Loss has a right to know how and why his application was singled out for such special attention.

(App.A, *infra*, A 11; emphasis added)

He criticized the Court's *sua sponte* and retrospective application of a new and higher burden of proof to the evidentiary hearing on fitness; ie. "clear and convincing evidence". (App. A, *infra*, A12-14)

In describing the due process abuses which denied Appellant a right to notice and a right to be heard during proceedings in this case, Simon said:

> Edward Anthony Loss will not be permitted to practice law in this State, not because he failed to follow the rules, but because we have. The court's departure from any concept of fairness or regularity has been complete, and I would say, almost Kafkaesque. Mr. Loss was forced to appear at an inquiry of a type which has never been convened before or since to defend himself against unknown charges. Unfettered by a previously announced standard of review or any rules as to admissibility of evidence, the court has now determined, not surprisingly, that its initial concerns as to Loss' fitness were justified. The court has misused its authority, and I dissent.

(App. A, *infra*, A17)

Justice Simon in his opinion advised Appellant that reapplication for admission would be fruitless. (App. A, *infra*, A17)

19. In response to public and media criticism of the court, Mr. Justice Ryan issued a specially concurring opinion on September 2, 1987 in which he endeavored to explain how the Loss matter came to be known by the high court. (App. B, *infra*) Ryan revealed the existence of the *ex parte* proceedings that led up to the June 4, 1986 order. Ryan criticized Justice Simon's accusation that there were "informal communications" to the court. He explained that the court learned of the Loss case through a

member of the Board of Law Examiners who communicated to a liaison court justice that there were certain voting irregularities within the committee. (See App. B, *infra*, B2-4)

Justice Ryan did not specifically address the issue of whether there also was an informal communication regarding the merits of Loss' certification or how the court came to say in its June 4, 1986 order that it knew of "unusual circumstances brought out at the hearing before the Character and Fitness Committee" (App. E , *infra*, E1); but he did say that "this court is not limited in its sources of information", as long as due process considerations are honored. (App. B, *infra*, B6)

20. On September 4, 1987 pursuant to Justice Simon's dissent the Appellant filed a Motion to Supplement the Record before the court, requesting disclosure of any "informal communications" that may have occurred. On October 30, 1987 the court denied the motion saying that the matter was "fully addressed by Justice Ryan in his special concurring opinion filed September 2, 1987". (App. H, *infra*, H1)

THE QUESTION IS SUBSTANTIAL

The State cannot deny a law license or take it away in a manner that contravenes Due Process. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238 (1957); *Willner v. Committee on Character*, 373 U.S. 96, 103, (1953); See also *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 574 (1972). The judgment of the Illinois Supreme Court – denying the Appellant admission to the bar – has stirred a constitutional controversy over the integrity of the bar admissions process in Illinois that is national in scope. This case pits the state court's inherent authority over the licensing of attorneys as against its Constitutional duty to provide a fundamentally fair admissions process.

The constitutional dangers implicit in the unbridled use of inherent power were manifested time after time in this case. Rather than follow its own rules which required that upon certification an applicant "shall thereafter be entitled to admission to the bar", the Illinois Supreme Court, without notice, engaged

in "informal communications" about the case, conducted *ex parte* proceedings which consequently nullified two consecutive certifications of Appellant, and then installed itself as the judge of his "fitness" by ordering its own review. This order created a new bar admissions rule of *ad hoc* discretionary review of selective certifications devoid of any procedural safeguards which is repugnant to the Constitution on its face, as applied, and as formulated. 28 USC 1257(2)

The New Rule Of Ad Hoc Review Provides No Procedures And Invites Unconstitutional Abuse.

1. Historically, the Illinois Supreme Court, through its rules and its case decisions, never reviewed cases of committee certifications because a certified applicant "shall thereafter be entitled to admission to the bar" and is "qualified for admission". Review was limited to the "arbitrary refusal" of certifications by the committee and the rules reflected that limitation by providing appeals safeguards only for the uncertified applicant who was entitled to a finding, notice, an appeal, a record, and a transcript. *

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* Under its inherent power the Illinois Supreme Court enacted rules for the administration of the licensing attorneys. These rules are to be construed under the general guidelines of statutory construction. Court Rule 2. They state that where a bar applicant is certified as fit by the Character and Fitness Committee, "the applicant shall thereafter be entitled to admission to the bar". Rule 708 (c) The rules further provide that the Board of Law Examiners "shall certify to the court that such applicant is qualified for admission". These rules contained mandatory, not directory, language under Illinois law. See *Andrews v. Foxworthy*, 71 Ill. 2d 13,21, 373 N.E. 2d 1332 (1978) and *Clark v. Patterson*, 214 Ill. 533 (1905). Accordingly, every case dealing with the subject of review of Character and Fitness findings has conformed with these rules, saying that only where the committee makes an arbitrary refusal to certify will the court review it. *In Re Ascher*, 81 Ill 3d 485, 411 N.E.2d 1 (1980); *In Re Frank*, 293 Ill. 263, 127 N.E. 640 (1920); See also *In Re Anastaplo*, 3 Ill. 2d 471, 121 N.E.2d 826 (1954) Therefore, the court's rules when read together only provide standards for appeals from adverse findings and not from favorable findings. See *Curtis v. County of Cook*, 98 Ill. 2d 158, 456 N.E. 2d 116 (1983); Sutherland, STATUTORY CONSTRUCTION, Sec. 46.05 (4TH Ed 1973) The court's rule 708 (d) provides that "[a]n applicant... who deems himself aggrieved by the determination of the committee may, on notice to the committee, petition the Supreme Court for Relief." The court's rule 708 (c) states that the committee "shall file with the Board of Law Examiners a

(Footnote continued)

The Illinois Supreme Court's extraordinary *ad hoc* review order of June 4, 1986 created a "new rule [that] significantly changed the admissions process without first notifying applicant Loss, law students, the bar and the public". Simon, App. A, *infra*, A8. See *United States v. Nixon*, 418 U.S. 683, 698 (1952) This order, later codified by amendment, was legislative in character and repugnant to the Due Process and Equal Protection Clauses of the Constitution. As such it is subject to the review of this Court. 28 U.S.C. 1257(2). See *Atchinson T. & S. F.R. Co. v. Public Utilities Comm'n.*, 346 U.S. 346 (1953); *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Mayer v. City of Chicago*, 404 U.S. 189 (1973); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); and *In re Primus*, 436 U.S. 412 (1978).

The new rule provides that if the character committee certifies an applicant as fit, he shall thereafter be entitled to admission to the bar "unless the court orders otherwise". This rule on its face and as applied here invites the practice of *ex parte* "informal communications" about bar applicants to the judiciary at any stage and without notice . It condones *ex parte* decision-making by the judiciary before a case officially comes before it. In the eventuality that the court "orders otherwise", it provides no guarantee that there will be judicial review, *de novo* review , a court administrative style hearing, or anything at all. It makes no provision as to who brings the appeal, how it is brought, why it may be brought, when it should be brought, or even whether it should be brought. It announces no burden to go forward, no burden of proof, and no burden for review.

Mr. Justice Simon objected to the enactment of the court's new rule of *ad hoc* review on August 1, 1987. He said:

> While we are ultimately responsible for ensuring the qualifications of member of the bar, we cannot reserve to ourselves the power to act arbitrarily.

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statement that it cannot so certify, together with a report of its findings and conclusion."Rule 709 (a) provides the Character Committees with the power to make their own rules. The committee's Rules of Procedure recognized only the occasion of a denial of certification.

(Footnote continued)

> In the past, this court has routinely admitted to the practice of law those who passed the bar examination and were certified by the Committee. Absent from the rule as amended is any explanation of what circumstances would justify our ordering 'otherwise' and what deference is due the considered judgment of the Committee.
>
> Further, I fail to understand how such a matter would even come before use. We have neither the time, the ability, nor the inclination to review the qualifications of the two to three thousand persons who apply for admission each year...The only way I can foresee that our intervention under the rule as amended will be triggered is informally – by leaks from dissenting Committee members or tips from others who wish to see the application denied. The character review process, which must, of course, be searching, should not be turned into a witch-hunt with this court acting as both denouncer and jury.
>
> Authority to certify...should remain with the Committee...in the absence of a statement of clear standards and procedures for evaluation of these matter by this court.

(110A *Illinois Revised Statutes* 708; Off. Aug. 1, 1987; Simon dissenting)

Although the Appellant may reapply for admission again, if he does, he will be exposed to the same unconstitutional rules that were retroactively applied to this case.

2. This Court pronounced in *Willner* that every bar applicant is entitled to notice, a right to be heard, a right to confront any accusations against him, and a right to confront any accuser

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The committee's rule 5.6 states that "[i]f, after a hearing, the Hearing Panel is not prepared to certify the Applicant, it shall deliver a report of its findings and conclusion to the Secretary and the Board, with a copy being furnished to the Applicant".

against him. *Willner v. Committee on Character*, 373 U.S. 96, 103, 105 (1963). This Court added that these due process safeguards necessarily require that the bar applicant have an opportunity to file pleadings, raise relevant issues and test the legitimacy of proceedings against him. *Holt v. Commonwealth of Virginia*, 381 U.S. 131, 136 (1965) In particular, where the nature of the proceedings are administrative or regulatory, this Court has incorporated the Confrontation Clause of the Sixth Amendment into its Due Process scrutiny. *Greene v. McElroy*, 360 U.S. 474, 497-498 (1959) None of these safeguards were provided to the Appellant.

Instead, the court engaged in *ex parte* proceedings against the Appellant. Mr. Justice Ryan's specially concurring opinion evidences the fact that months before this matter was ordered up for appeal, the court acted to void two certifications of the Appellant on separate occasions. In its first action, the court voided the certification of the Appellant by the hearing panel of the character committee and then remanded it for redetermination before the full committee.(App. B, *infra*, B3-4) Later, when the full committee recertified the Appellant, the court again voided it and, extraordinarily, ordered itself to hear the matter. (App. B, *infra*, B3-4) These judicial actions were done to the exclusion of the Appellant who was afforded no notice, no right to be heard, no right to confront the issues, and no right to object to judicial decisions that operated to divest him of his entitlement to admission to the bar. Rule 708(c)

3. As an additional violation of due process, it appears that the Illinois Supreme Court unconstitutionally engaged in informal *ex parte* communications about the facts of this case before its June 4, 1986 order to review this case. That order acknowledged familiarity with the "extraordinary circumstances" of the case. (App. E *infra*, E1) Justice Goldenhersh wrote in the majority opinion that the court "may initiate such review, *sua sponte*, or upon the basis of information *regardless of its source*." (App. A, *infra*, A4; emphasis added) Justice Simon criticized the use of "informal communications" or "gossip" and he expressed concern over whether the entire process would be a "sham". (App. A, *infra*, A11) Justice Ryan defended the court's practice, saying

that the the court learned of the Appellant's case through liaison channels between the court and the Board of Law Examiners who reported procedural voting irregularities within the Character and Fitness Committee. (App. B, *infra*, B3-5) Justice Ryan conspicuously omitted any mention of whether the actual substantive facts of the case were also imparted to the court; nor did he explain how the court came to write in its June 4, 1986 *sua sponte* order of appeal that the Loss case presented "extraordinary circumstances". But he did remark that "this court is not limited to its sources of information... [I]f we were prohibited from communicating with our State Board of Law Examiners or our Committee on Character and Fitness other than by receiving a certification of fitness upon filing, how would this court have been alerted to the closeness of the vote of the full Committee, the possible irregularity in the proceedings, or even the desirability of reviewing the unusual facts of this case?" (App. B, *infra*, B6-7)

This conduct stands as a new, unwritten rule, in Illinois: that the court and its committees may, on a selective basis, engage in *ex parte* communications with "sources" about an applicant's case. This offends every concept of due process of law because it fails to ensure some fundamental safeguards such as: (1) the names of the "sources"; (2) the instruments by which this information was communicated; (3) the substance of the communications; (4) a right to formally respond to it by objection, motion or simply confrontation; and (5) the right to test the truthfulness of the information. In short, a right to notice, to confront and to be heard before, not after, judicial actions occur. All members of the legal profession are at risk should an unfriendly arbiter under the guise of its "inherent authority" to protect the citizenry allows itself to privately receive unsworn evidence and then act upon it without notice or explanation. "Inherent authority" is not license to violate our constitutional rights to due process and equal protection.

The New Rule Requires the State Court to Bring Its Own Appeal and Then Judge It.

4. The very fact that the judiciary may formally create a controversy and then judge it offends the Constitution. *In re Murchinson*, 349 U.S. 133 (1955). The Illinois Supreme Court created this controversy by voiding two successive committee certifications of Appellant. No official "party" to the initial proceedings requested that the character committee's certifications be voided. No "party" applied for an appeal. No "party" requested that the court ignore its own rules. Instead the state court brought its own appeal and then judged it.

> [O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In re Murchinson, 349 U.S. at 1307.

In *Murchinson*, this Court banned a Michigan judge from hearing a contempt case that he himself brought in his capacity as a "one man grand jury":

> It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. . .
>
> Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. . .
>
> Fair trials are too important a part of our free society to let prosecuting judges be trial judge of the charges they prefer.

In re Murchinson, 349 U.S. at 138.

In the instant case, the Illinois Supreme Court engaged in its own investigation of the "extraordinary circumstances" of the

Loss case through its "sources" and to the total exclusion of the accused. Then it voided the Appellant's vested right to admission on two occasions. To legitimatize its conduct, it brought the matter before itself and judged it. Unaware of the court's previous conduct,the Appellant filed briefs and personally appeared before the Illinois Supreme Court in Springfield, Illinois in what might now be characterized as a "mock trial".

The New Rule Guarantees No Hearing Before Or After a Fitness Certification Is Voided.

5. The court's gratuitous order which granted a hearing to the Appellant did not cure its patent unconstitutionality. Inherent in the order and its later codification as a rule, is that it was granted as a matter of grace and not right. There is no guarantee of a due process hearing before fitness certifications are voided. Such hearings cannot be granted on an *ad hoc* basis or as a matter of favor or grace. *Coe vs. Armour Fertilizer Works*, 27 U.S. 423 (1915)

> [A] hearing granted as a matter of favor or discretion [cannot] be deemed a substantial substitute for due process of law that the Constitution requires.* * * The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.

Coe, 27 U.S. at 424.

The Administrative Determination of Certification Should Be Final.

6. For the first time in its history, the court reviewed a committee determination that was not adverse to the bar applicant. This violated the court's own rules and, additionally, a very fundamental notion of due process and fair play as was illustrated in *Peter v. Hobby*, 349 U.S. 331 (1955). In *Peter* the President's Loyalty Board "reviewed" two favorable hearing determinations by its inquiry panel even though its own rules provided for review only upon an "adverse finding" by the panel. The debarment of the government employee by the Board was reversed by this Court which construed such rules to be "in keeping with the

deeply rooted principal of criminal law that a verdict of guilty is appealable while a verdict of acquittal is not. This safeguard was one of the few, and perhaps one of the most important, afforded an accused employee under the Order". *Peter*, 349 U.S. at 345.

7. The issues in the Loss case transcend whether Loss is fit to be a lawyer or whether the Illinois Supreme Court has the inherent authority to exclude a person from the practice of law. This Court in *Willner* said that "the requirements of procedural due process must be met before a State can exclude a person from practicing law." *Willner*, 373 U.S. at 102. This Court is not asked to address the grounds that "justify denial of a license to practice law, but only with what procedural due process requires if the license it to be withheld." *Willner*, 373 U.S. at 103 The Illinois Supreme Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's power of review.

CONCLUSION

Probable jurisdiction should be noted. If not, then the Appellant requests a that a *writ of certiorari* be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Illinois Supreme Court & Dissent

APPENDIX A

Opinion of the Illinois Supreme Court & Dissent

* * * * *

DOCKET NO. M.R. 3972

IN THE
SUPREME COURT OF ILLINOIS

In re:	)
	)
EDWARD A. LOSS III,	)
	)
Petitioner.	)

JUSTICE GOLDENHERSH delivered the opinion of the court:

On November 21, 1984, petitioner, Edward A. Loss III, submitted to the State Board of Law Examiners (Board) his application for admission to the bar of Illinois. An inquiry panel of the Committee on Character and Fitness voted to recommend that petitioner not be certified to the Board for admission to the bar. Pursuant to Rule 4.4 of the committee's rules of procedure, petitioner's application was referred to a hearing panel. After hearing testimony, the panel voted to certify to the Board that petitioner was fit to be admitted to the bar. Subsequently, the full committee considered and approved petitioner's application, and upon receipt of certification (87 Ill. 2d R. 708(d)), the Board recommended to the court that petitioner be admitted. In an order entered on June 4, 1986, stating that "upon review of the extraordinary circumstances brought out at the hearing before the Character and Fitness Committee: it was unable to say that petitioner had satisfactorily established that he was of good moral character, the court granted petitioner leave to file a petition for admission addressing the question of character and fitness. The Administrator of the Attorney Registration and Disciplinary Commission was directed to file a response, and the parties have filed briefs and argued orally.

Petitioner contends that this court has delegated to the committee the authority to determine whether an applicant has established that he is of good character and fit for admission to the bar. He argues that our decisions have consistently held that the court will not reverse the committee's findings (*In re Ascher* (1980), 81, Ill. 2d 485; *In re Frank* (1920), 293 Ill. 263) unless there has been an abuse of discretion. He argues, to, that under Supreme court Rule 708(c) (87 Ill. 2d R. 708(c)) certification by the committee entitles him to admission. Finally, he contends that to deny his admission to the bar would deny him due process.

The Administrator contends that the court has the inherent jurisdiction to review the recommendation of the committee and should deny petitioner's application for the reason that his record shows him to be unfit for admission to the bar of Illinois.

The record shows that petitioner was born in 1947 and that, from the early 1960's until approximately 1980, he was involved in juvenile delinquencies, criminal activity, and drug and alcohol addition. While a student at high school, petitioner was suspended on approximately 23 occasions, and on his first job was discharged for stealing money form vending machines. He was charged with robbery and, as an alternative to conviction, was given an opportunity to enter military service. He enlisted in the Marine Corps. While in the Marine Corps, he was absent without leave for a period of 71 days and ultimately was given an undesirable discharge. Petitioner was also arrested and convicted on charges of disorderly conduct (for stealing money), selling marijuana. The record is not clear as to the number of convictions. He used various aliases. In 1975, petitioner was arrested for possession of marijuana, selling heroin, and for theft from a gasoline station.

In December 1980, petitioner submitted an application for admission to the De Paul University College of Law. He appears to have been less than candid in his application and failed to reveal convictions for disorderly conduct and theft. The application contains other answers which appear to be less than accurate. In contrast to his application for admission to law school, his application for admission to the bar candidly reveals facts and

details about his background, including arrests and convictions not previously noted. During his law school years he was an excellent student, started a business by means of which he supported his family, and aided and befriended many of his fellow students.

At the hearing, a United States district judge testified that for two semesters petitioner had worked with him in his extern program, that his work was excellent, and that he believed petitioner to be an individual of great integrity. He further testified that, knowing of petitioner's experience with drugs and alcohol, his arrests, and his undesirable discharge from the Marines, he believed petitioner to be of good character. Two professors at the law school attended by petitioner testified that he had been completely rehabilitated, and they believed him presently to be of good moral character. They recommended his admission to the bar. An employment counselor for the Safer Foundation testified on petitioner's behalf. A number of petitioner's friends and fellow students testified in his behalf, and several of his classmates expressed gratitude for help petitioner had given them in courses with which they had difficulty at law school.

We consider first petitioner's contention that the court has delegated to the committee its power to determine whether an applicant is of good character and fit to practice law. Simply stated, it is petitioner's position that the court has provided by rule that the matter is to be determined by the committee and has further provided therein that, upon certification by the committee, and applicant is "entitled to admission" (87 Ill. 2d R. 708(c)) and that there is no provision in the rule for review by the court of a decision favorable to an applicant. He argues further that the rule has the force of law and that he had the right to rely upon the provision of the rule that upon certification by the committee he would be admitted.

This court is vested with the inherent power to regulate admission to the bar. (*In re Application of Day* (1899), 181 Ill. 73.) This power carries with it the concomitant duty to protect the public from dishonesty and incompetency on the part of members of the bar. (*People ex rel. Chicago Bar Association v. Goodman*

(1937), 366 Ill. 346, 349-50.) The exercise of the power and the discharge of the duty required that the final judgment concerning admission of the duty required that the final judgment concerning admission of an applicant rest with this court. The determination by the committee concerning the character and fitness of the applicant although entitled to weight, is advisory, and neither binds this court no limits its authority to take action. *In re Mitan* (1979), 75 Ill. 2d 118.

Petitioner asks hypothetically, assuming that the court is to review the committee's findings, in what manner is it to obtain pertinent information. The short answer is that the court may initiate such review, *sua sponte*, or upon the basis of information regardless of its source. It may inquire into events subsequent to the certification or require additional information concerning events which occurred prior to the hearing before the committee. Rule 708(a) provides that the members of the Board are *ex officio* members of the committee. Although the Historical and Practice Notes contain no explanation for the inclusion of this provision, it would appear that the court wished the Board to be aware of all proceedings before the committee in order that the court might be fully advised concerning those proceedings.

Petitioner argues, with justification, that a denial of admission without further procedures following certification would constitute a denial of due process. It should be noted that here the court, *sua sponte*, provided an opportunity for petitioner to appear and persuade the court that the record before the committee did, indeed, support the conclusion that he had been fully rehabilitated and was fit to be admitted to the practice of law.

We turn to petitioner's contention that, absent arbitrary action by the committee, our prior decisions preclude review by this court. The court has not previously considered a standard of review of a finding that an applicant be certified; the case reviewed have involved denials of certification. (See, e.g., *In re Frank* (1920), 293 Ill. 263; *In re Latimer* (1957), 11 Ill. 2d 327; *In re Ascher* (1980), 81 Ill. 2d 485.) Review in those cases required that we respect that grant to the committee of discretion in certification (*In re Frank* (1920), 293 Ill. 263) and also protect an

applicant's right to due process and to be free from arbitrary action by the committee. See *Schware v. Board of Bar Examiners* (1957), 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752.

Different concerns are present here, and a different standard of review applies. A review of a grant of certification involves the court's duty to protect the people of Illinois against incompetency and dishonesty on the part of members of the bar. (*People ex rel. Chicago Bar Association v. Goodman* (1937), 366 Ill. 346, 349-50.) "A license granted by this court to practice is a guaranty that, as far as this court is advised, the person holding such license is a fit person***." (*In re Rosenberg* (1953), 413 Ill. 567, 576.) In order to provide such guaranty the court must determine that the record shows by clear and convincing evidence that petitioner has been rehabilitated and is fit to practice law. *In re Kuta* (1981), 86 Ill. 2d 154, 157.

We consider next petitioner's contention that under Supreme Court Rule 708(c), having been certified by the committee, he is entitled to admission to the bar. A rule like a statute, must be construed to avoid an absurd or unconstitutional result. Were we to construe Rule 708(c) in the manner urged by petition we would face the absurd situation that, confronted with the record here, we were powerless to consider the correctness of the decision to certify and would be required to blindly admit petitioner. This does not comport with our duty to protect the People against incompetency and dishonesty on the part of members of the bar. (*People ex rel. Chicago Bar Association v. Goodman* (1937), 366 Ill. 346, 350.) In *In re Mitan* (1979), 75Ill. 2d 118, the court held that the omission of information from an attorney's application for admission to the bar constituted fraudulent concealment of improper activities which warranted disbarment. If conduct prior to admission was held to be the basis for disbarment there is no impediment to the exercise of this court's authority prior to admission. To read literally the language of the rule would divest this court of jurisdiction to review the finding of the committee and thereafter deny admission, resulting in an unconstitutional delegation of our jurisdiction and an abdication of our duty to regulate the bar of this State.

We consider now petitioner's contention that he relied upon procedures outlined in our rules, that his reliance entitles him to admission, and that to deny him admission results in fundamental unfairness. An applicant for admission to the bar has no vested interest in the continued existence of a rule of this court. (*Schlenz v. Castle* (1981), 84 Ill. 2d 196.) The rules of this court are under constant review and are frequently amended and revised. Petitioner, like all other litigants, is bound by this court's construction of the rule. Unfortunate language in the rule upon which petitioner relied will not serve to divest this court of jurisdiction to perform its constitutional duty. The procedure followed provided petitioner all of the due process which the situation required.

We consider next petitioner's assertion that he could not foresee the lengthy 18-month "roller coaster" process that his application generated and that the ensuing delay denied him fundamental fairness. The transcript shows that his record merited close scrutiny, and in view of petitioner's record, the hearing and the extensive testimony were necessary and proper. The review was essential to the protection of the integrity of the bar and the interests of the People of this State. In light of the circumstances, we cannot say that the time elapsed has been unduly lengthy. See, e.g., *In re Latimer* (1957), 11 Ill. 2d 327.

We consider now petitioner' contention that he is fully rehabilitated and fit for admission to the bar. The burden of proving good present moral character is on petitioner. (*In re Ascher* (1980), 81 Ill. 2d 485, 498.) Because of his prior record, petitioner also bears the burden imposed upon an applicant for reinstatement to the bar to show by clear and convincing evidence not only that he is ready to "'return' to a beneficial, constructive and trustworthy role" in society (*In re Wigoda* (1979(, 77 Ill. 2d 154, 159), but also that his rehabilitation is such that he is a fit person to practice law.

Rehabilitation is the important factor in the court's evaluation of a petition for reinstatement (*In re Silvern* (1982), 92 Ill. 2d 188), and the same rationale applies here.

A member of the Illinois Board of Law Examiners has examined indicia of rehabilitation of character and fitness. (Duhl, *Character and Fitness-The Rehabilitation Factor*, the Bar Examiner, Feb. 1983, at 11.) The factors, based primarily on *Schware v. Board of Bar Examiners* (1957), 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752), are (1) community service and achievements, as well as the opinions of others regarding present character; (2) candor before the court; (3) the age of the applicant at the time of the offenses; (4) the amount of time which has passed since the last offense; (5) the nature of the offenses; and (6) the applicant's current mental state.

Petitioner has presented an impressive list of character witnesses, including former classmates, professors and employers who attest to his rehabilitation and present good moral character. He has presented evidence of his academic achievements, including his graduation with honors, his externships and clerkships, his participation on law review, and his tutoring of a handicapped law student. He notes that his last arrest occurred more than 11 year ago and attests that he has overcome his drug and alcohol addiction. He points out that his arrests occurred during those years when he was addicted to drugs, and that most of his offenses were drug related.

Although the Administrator did not present evidence at the hearing before the committee, he has moved in this court to supplement the record with newly discovered evidence. He argues that petitioner's testimony was inconsistent, lacking in candor, and revealed additional misrepresentations in his application for admission to the bar. He contends that the record requires denial of petitioner's application.

We need not lengthen this opinion by specific citations to the transcript, but we agree with Administrator that the proceedings before the committee reflect inconsistencies in petitioner's testimony and belated recollection of matters omitted from his application for admission to the bar. We note further that the Administrator's motion for leave to supplement the record contains allegations which, if proved, may be relevant to the issues

of rehabilitation and present good moral character and that a document filed by petitioner in this court shows that subsequent to the hearing before the committee petitioner's marriage was dissolved.

Upon consideration of the record in its entirety, we conclude that the evidence does not support the finding that petitioner is presently of good character and sufficiently rehabilitated to be admitted to the practice of law.

Notwithstanding the conclusion reached, we note that rehabilitation is a continuing process and the record reflects substantial improvement in petitioner's condition. We find apposite here our statement in *In re De Bartolo* (1986), 111 Ill. 2d 1, that petitioner's prior conduct need not "bar him for life form the practice of law. Just as an attorney who has been disbarred, disbarred upon consent, or suspended until further order of the court may, after passage of the applicable period of time, seek reinstatement (see 94 Ill. 2d R 767), by analogy the petitioner here should be allowed to reapply for admission, and he may do so at this time. Upon the petitioner's reapplication, the committee may consider all matters that are relevant to his moral character and general fitness to practice law, including his conduct since the hearing held here and his candor in filling out his new application and in responding to whatever inquiry the committee makes." 111 Ill. 2d 1,6-7.

For the reasons stated, the petition for admission is denied.

Petition denied.

JUSTICE WARD took no part in the consideration of decision of this case.

JUSTICE SIMON, DISSENTING:

> "If the committee is of the opinion that the applicant is of good moral character and general fitness to practice law, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar. If the committee is not of that opinion, it shall file with the Board of Law Examiners a statement that it cannot so certify, together with a report of its findings and conclusion." 107 Ill. 2d R. 708(c).

This is the first time this court has deviated from its own rules and case law by reviewing, *sua sponte*, a bar application and denying admission to an applicant the Committee on Character and Fitness has certified as fit to practice law. In so doing, the majority ignores this court's prior decisions which limit review of the committee's findings to the "unlikely event that there has been an arbitrary refusal of a certificate [by the Committee on Character and Fitness]." (*In re Latimer* (1957), 11 Ill. 2d 327, 330, cert. denied and appeal dismissed (1957), 355 U.S. 82, 2 L. Ed. 2d 111, 78S. Ct. 153; see also *In re Ascher* (1980), 81 Ill. 2d 485, 487.) In addition, the majority disregards the clear directive of Supreme Court Rule 708(c), which it shrugs off as "[u]nfortunate language" (slip op. at 5). At the time of Loss' certification, that rule provided that upon the committee's certification of an applicant's "good moral character and general fitness*** the applicant shall thereafter be entitled to admission to the bar." (Emphasis added.) (107Ill. 2d R. 708(c).) Rule 708(c) has been amended effective August 1, 1987, but no one suggests the amendment applies to Loss. By its opinion the majority has significantly changed the admission process without first notifying applicant Loss, law students, the bar, and the public.

The majority justified its decision to review Loss' application with the conclusory statement that to do otherwise would be both

absurd and unconstitutional. It would be absurd, the majority states, because otherwise, "confronted with the record here, [we would be] powerless to consider the correctness of the decision to certify and would be required to blindly admit petitioner." (Slip op. at 5.) It would be unconstitutional, according to the court, "[t]o read literally the language of the rule' for the same general reason: to do so would "divest this court of jurisdiction to review the finding of the committee *** resulting in an unconstitutional delegation of our jurisdiction and an abdication of our duty to regulate the bar of this State." Slip op at 5.

What the majority overlooks in rejecting the clear and literal meaning of the rule is that the Committee on Character and Fitness "is an arm of this court" (*In re Latimer* (1957), 11 Ill. 2d 327, 330), and our own rules provide that it is a proper delegation of authority to leave the issue of an applicant's character and fitness to the members of the committee acting as commissioners of this court. (See 107 Ill 2d R. 709(b).) Endowing the committee with this authority under our carefully articulated rules hardly constitutes and abdication of our responsibility to oversee the bar. Of course, the court has the authority to alter or repeal its rules, but it did not bother to do so here until first departing from the existing rule. Due process demands that we follow our own rules while they remain in force, and they are binding on this court the same as on litigants. (*Harris v. Annunzio* (1952), 411 Ill. 124, 127; cf. *United States v. Nixon* (1974), 418 U.S. 683, 696, 481 L. Ed. 2d 1039, 1057, 94 S. Ct. 3090, 3101.) It is no answer to say that Mr. Loss has been afforded a hearing, for the *ad hoc* proceeding ordered by this court was itself fundamentally unfair. In their expressed desire to avoid an absurd and unconstitutional result, my colleagues have wrought just that.

Without explanation and on its own motion, the court issued an order on June 4, 1986, after the committee had already certified Loss as fit to practice law, "granting him leave" to file yet another petition (which he did not seek leave to file) for admission to the bar and allowing the Administrator of the Attorney Registration and Disciplinary Commission (the Administrator), who acted as attorney for the committee, leave to respond. The

order, which also set a date for oral argument, was seriously deficient for several reasons.

It failed to advise Loss of how this matter even came before us. Nothing in the record indicates the sources of the information which triggered this extraordinary proceeding. Such review has not taken place-in even a single instance -since I have been a member of this court. Moreover, as the majority concedes, there are no formal procedures for keeping the court apprised of an applicant's interaction with the Committee on Character and Fitness. (See slip on 3-4.) The only way this court could have been advised of Loss' situation, therefore, was through an informal communication. The possibility that this unusual proceeding was initiated on the basis of rumors or gossip turns the entire admission process into a sham. It appears that those who can grab the court's ear and are displeased with an applicant can trigger an additional inquiry, by this court itself, into the applicant's moral character. To adequately address the question of his good character and fitness Loss has a right to know how and why his application was singled out for such special attention.

The June 4 order had another shortcoming: it failed to inform Loss of the specific issues to be addressed in the oral argument it commanded. The committee had already held a hearing in which argument was presented and witnesses subjected to extensive cross-examination. No one took exception to the committee's findings or its certification. If the purpose of the oral argument was to address the court's concerns-since it was the court itself which asked for further review-such concerns were never articulated. Loss was simply told to appear and to argue without any indication of what this court's role in the process would be, or what needed to be demonstrated before he could gain admission. When Loss appeared before us personally and offered to answer the court's questions, the court remained mute.

Since this court has never reviewed a grant of certification by the Committee on Character and Fitness, and since there is no provision for such review in our rules, we have never, as the majority acknowledges (slip op. at 4), developed an appropriate standard for reviewing the committee's findings. In the majority's

haste to find one, it has slipped into another error. The majority summarily discards the standard for reviewing denials of certification--arbitrary action by the committee (slip op. at 4) and in its place concludes that to gain admission to the bar Loss must prove by clear and convincing evidence that he has been rehabilitated and is fit to practice law (slip op. at 4). Putting aside for the moment the wisdom of requiring such stringent proof, the error in adopting this so-called standard is that it is not a standard of review at all, but rather a burden of proof. By confusing a standard of review with a burden of proof, I respectfully submit that the majority has turned an already unconstitutional proceeding into a morass of confusion.

The findings of an administrative agency, such as the Committee on Character and Fitness, are accorded a great deal of deference. With respect to the hearing panels of the Attorney Registration and Disciplinary Commission, for example, "[w]e have repeatedly said *** that the findings of those boards are 'entitled to virtually the same weight as the findings of any initial trier of fact.'" (*In re Wigoda* (1979), 77 Ill. 2d 154, 158, quoting *In re Hallett* (1974), 58 Ill. 2d 239, 250.) This is because the hearing panel alone has had the opportunity to observe the witnesses and judge the credibility of their testimony. 77 Ill. 2d 154, 158.) It is the party seeking to reverse the findings of the administrative body who has the burden of persuading the court on review that those findings are against the manifest weight of the evidence.

In the case before us no one, not the committee, not the Administrator, not Loss, has initiated any review of the committee's finding. It would be ridiculous to suggest that the court, which raised this issue *sua sponte*, ought to have this burden; but it is equally anomalous to place the burden on Loss. He has already convinced the committee below that he was fit to practice law and now seeks only to maintain the findings of the court's own committee.

The majority suggests that the reason Loss is forced to meet such a heavy burden on review is because the showing made

before the Character and Fitness committee was inadequate. According to the majority , instead of the showing that all other applicants are required to meet, a "burden of proving good present moral character" (slip op. at 6, citing *In re Ascher* (1980), 81 Ill. 2d 485, 498), the committee should have insisted because of his history that Loss show "by clear and convincing evidence *** that he is ready to '"return" to a beneficial, constructive and trustworthy role' in society (*In re Wigoda* (1979), 77 Ill. 2d 154, 159), [and] that his rehabilitation is such that he is a fit person to practice law." (Slip op. at 6.) Waiting until Loss has presented his case to both the Committee on Character and Fitness and this court before announcing the applicable burden of proof is grossly unfair to Loss and violative of his due process rights because it fails to give him notice of what he must show. Further, the majority still leaves us in the dark with respect to the actual standard of review it thinks ought to be applied. Its decision here seems to approve of some aberrant form of *de novo* review where a decision is made without deference to the findings of the administrative body.

But even assuming that all of these procedures were proper, the heavy burden of proof the majority applies here is inappropriate. Proof by clear and convincing evidence is the same showing a disbarred attorney seeking reinstatement must demonstrate. Unlike the attorney petitioning for reinstatement, however, an applicant in Loss' position has never breached nor abused a position of public trust such as an attorney occupies. Considerations involved in determining whether to readmit a disbarred attorney to the practice of law, such as the impact of the attorney's misconduct on the legal profession, the public, and the administration of justice, are not applicable here. See, e.g., *In re Zahn* (1980), 82 Ill. 2d 489, 493.

Further, it is difficult to justify such a burden of proof, a showing rarely required by either a court or an administrative agency, without good reason. Proof by clear and convincing evidence is required, for example, to void a will on the ground of fraud or undue influence. (See, e.g., *Weininger v. Metropolitan Fire Insurance Co.*(1935),359 Ill. 584, 598.) The reason for requiring

a strict showing is obvious. Not only is such evidence easy to fabricate, but the primary witness is, unfortunately, unavailable to testify. Similarly, we require a disbarred attorney to make this type of showing because he has previously misused the trust this court placed in him and has been found unfit to practice. Faced with that record, prudence requires an attorney seeking reinstatement to demonstrate by clear and convincing evidence that he is fit to be trusted. A review of the committee's grant of certification in favor of Loss, however, presents none of these problems. There has never been a finding of breach of the public trust which the petitioner seeks to overcome.

Even applying the inappropriate standard, however, the court is still obliged to admit Loss since he has demonstrated by clear and convincing evidence that he is rehabilitated and fit to practice law. At the hearing before the Committee on Character and Fitness, Loss presented 15 witnesses. This group of witnesses who attested to his good moral character and rehabilitation included the Honorable George N. Leighton, a judge of the United States District court for the Northern District of Illinois, who serves with distinction on that court as he did on both the Illinois Appellate Court and the circuit court of Cook County, and who was a former chairman of our Committee on Character and Fitness. Judge Leighton, who had the opportunity to supervise Loss when Loss participated in an extern program in law school, appeared in person before the committee and testified:

> "Mr. Loss showed me in many ways on many occasions that he is trustworthy. I would highly recommend Edward Anthony Loss because of his outstanding qualities of character. In my judgment he has those traits with which experience will make him a great lawyer and distinguished member of our profession."

Loss' last arrest occurred in 1975, more than 12 years ago. Within the past six years he not only completed law school with an outstanding record, but he also started his own business where he helped rehabilitate ex-convicts and ex-drug addicts by providing them with jobs. While, as the majority states, Loss was

not totally candid about his past on his application to the DePaul College of Law, the dean of that school testified that Loss was fit to become a member of this bar. Besides, Loss' application to DePaul was filed in 1980, approximately seven years ago. Under our rules even an attorney who has been disbarred may file for reinstatement after five years. (107 Ill. 2d R. 767.) Therefore, his law school application should not preclude Loss from being admitted to the bar.

The Administrator presented no witnesses at the hearing before the committee. In denying Loss' application, the majority points out that his marriage was dissolved subsequent to the hearing. (Slip op. at 7.) How this is relevant to Loss' fitness to practice law escapes me. While I have no statistics on the number of divorced attorneys practicing in this State, I am certain that there are many. It would be preposterous to suggest that these attorneys should surrender their law licenses along with their marriage certificates as if, somehow, the dissolution of their marriages obliterated their ability to competently practice law. It is equally absurd to assume the same with respect to Loss' divorce.

The majority also relies on information supplied by the Administrator subsequent to the hearing that "*if proved*, may be relevant to issues of rehabilitation and present good moral character." (Emphasis added.) (Slip op. at 7.) The newly discovered evidence which the Administrator argues revealed additional misrepresentations by Loss is a mortgage application and supporting documents executed by Loss on May 15, 1986. These documents, according to the Administrator, indicate that Loss is not destitute and establish that he was more than able to pay his attorney fees. Thus, the Administrator alleges that a letter Loss sent to the court on or about June 9, 1986, which prompted our voluntary offer to cover these costs, was a deliberate misrepresentation and demonstrates that Loss is unfit to practice law. The letter, which Loss wrote five days after the court advised him *sua sponte* that it had decided to review his application and hold oral argument, informed us:

> "Unfortunately, the financial exigencies of running a business and rearing a family preclude any further

> expenditures in the above captioned cause. Should the court see fit to award me costs and fees to pursue the matter further, I will certainly do so. Absent such an award, or *pro bono* intervention, I am unable to continue prosecution of the case. Accordingly, I ask to be sworn in, consistent with promulgated court rules, or, in the alternative, for a definitive finding by the court that I am not of good, present moral character based on the record of the case."

It was a matter of record before the committee that both Loss and his wife were gainfully employed and owned a home. Further, while the Administrator asserts that these documents establish Loss' net worth at $209,000, other evidence indicates that he has liquid assets of approximately $4,000. but regardless of the exact amount of Loss' holdings, his reference to financial exigencies was not only a far cry from a claim of indigence, but also grossly inadequate proof of an intent to defraud this court. In my view, this letter was written in response to our decision to disregard both our case law and rules. It served simply to inform us of the choice Loss made: he decided not to expend any more of his resources in pursuing admission to the bar and would not participate in this highly exceptional proceeding unless we awarded either *pro bono* assistance or fees to offset the costs. The court responded by stating it would cover the fees and costs. Loss was entitled to make this choice, and there is no justification for seizing upon his communication to conclude, as the Administrator argues, that Loss intended to deceive this court. I fail to comprehend how the majority's decision to deny Loss admission to the bar on this ground can be supported under any rational concept of judicial review.

The information submitted to the court subsequent to the hearing is both unproved and irrelevant, and the omissions in Loss' application for admission to the bar are insignificant. Where the findings and recommendations of the committee are "'based on uncontradicted and clear evidence,' they will be adopted." (*In re Wigoda* (1979), 77 Ill. 2d 154, 150 quoting *In re Phelps* (1973), 55 Ill. 2d 319, 322.) Since no evidence contradicts the committee's finding, even under the inappropriate standard the majority

imposes there appears to be no fair basis for impeaching the committee's determination that Loss is fit to practice law.

The majority's final suggestion, inviting Loss to reapply immediately for admission (slip op. at 7), strikes me as paradoxical. What showing could Loss make upon a reapplication other than what he has already submitted? The court speaks of an inquiry into Loss' conduct since the hearing was held a year ago, but nothing before the court even hints at anything Loss has done in the past year which adversely reflects upon his fitness. Of what significance is the court's suggestion that the committee consider Loss' candor in filling out his new application when the majority concedes that his previous application was candid? (Slip op. at 2.) Finally, the majority suggests that if a new application is received, the committee consider Loss' candor in responding to whatever inquiry the committee makes. Yet there is no proof that Loss was less than candid when he testified before the committee last year. I fail to understand what could be accomplished by a new application except to further delay Loss' admission. In my opinion a second hearing would be a useless gesture.

Edward Anthony Loss will not be permitted to practice law in this State, not because he has failed to follow the rules, but because we have. The court's departure from any concept of fairness or regularity has been complete, and I would say, almost Kafkaesque. Mr. Loss was forced to appear at an inquiry of a type which has never been convened before or since to defend himself against unknown charges. Unfettered by a previously announced standard of review of any rules as to admissibility of evidence, the court has now determined, not surprisingly, that its initial concerns as to Loss' fitness were justified. The court has misused its authority, and I dissent.

APPENDIX B

Specially Concurring Opinion

APPENDIX B

Specially Concurring Opinion

* * * * *

DOCKET NO. M.R. 3972

IN THE
SUPREME COURT OF ILLINOIS

In re:	)
	)
EDWARD A. LOSS III,	)
	)
Petitioner.	)

JUSTICE RYAN, specially concurring:

I concur in the opinion of the court. However, certain comments contained in the dissenting opinion compel me to write this special concurrence. Also, as noted herein, I am not satisfied that there was a valid certification of Loss' good character and fitness to practice law.

The author of the dissenting opinion has, inadvertently I hope, used innuendoes, general accusations, and emotionally charged language, which were seized upon by segments of the media, expanded and used to create a *cause celebre* over a"reformed drug addict and petty thief" whom this court has refused to license to practice law. I feel I must respond to the misleading and unfortunate statements by the author of the dissent, which have caused the media and the public to challenge the integrity of those who joined in the majority opinion. The language of the dissent which I find particularly objectionable states:

> "It (the order of June 4, 1986) failed to advise Loss of how this matter even came before us. *Nothing in the record indicates the source of the information which triggered this extraordinary proceeding.* Such

> review has not taken place—in even a single instance—since I have been a member of this court. Moreover, as the majority concedes, there are no formal procedures for keeping the court apprised of an applicant's interaction with the Committee on Character and Fitness. (See slip op. at 3-4.) The only way this court could have been advised of Loss' situation, therefore, was *through an informal communication*. The possibility that this unusual proceeding was initiated on the basis of *rumors or gossip turns the entire admission process into a sham. It appears that those who can grab the court's ear and are displeased with an applicant can trigger an additional inquiry*, by this court itself, into the applicant's moral character. To adequately address the question of his good character and fitness Loss has a right to know how and why his application *was singled out for such special attention*." (Emphasis added.) Slip op. at 9-10.

I find this language offensive because it implies that there was some clandestine, unethical, and possibly illegal communications from some unspecified person or persons to certain members of the court, which caused Loss' application for admission to the bar to be "singled out for such special attention." (Slip op. at 10.) The author of the dissent was given every bit of information that other members of the court were given. Why did he not then, in the dissent, specify that about which he was complaining? Why was it necessary to resort to such damaging innuendoes and general accusations? Why was it necessary to invite the public to speculate as to what sinister activity had produced this result and the media to publicly imply that the "fix is in" on the court?

In an attempt to clarify the murky innuendoes of the dissent, I set forth herein the facts as they occurred. If the following constituted "informal communications, " or "rumors or gossip," or grabbing "the court's ear," why did the author of the dissent not complain about it in the conference room, when the matters

to which he now apparently alludes were openly discussed? Unfortunately, this recitation must, of necessity, be lengthy.

The large number of applicants for admission to the bar from the First Judicial District (Cook County) made it difficult for the Committee on Character and Fitness of that district to timely process the applications. For this reason, the procedures for processing the applications were changed in the First District. Our Rule 709(a) (107 Ill. 2d R. 709(a)) provides that the State Board of Law Examiners and the Committee on Character and Fitness may adopt rules for the proper performance of their respective functions. The changed rules of procedure for the Committee on Character and Fitness in the First Judicial District provide that the questionnaire, which is answered and submitted by the applicant for admission, will be reviewed by an examiner. (Rules of Procedure).) If adverse matters bearing on the applicant's character appear on the questionnaire, the examiner may refer it to any inquiry panel of three members. (Rules of Procedure, Rule 4.1.) The inquiry panel may certify the applicant only upon a unanimous vote. (Rules of Procedure, Rule 4.3.) If the inquiry panel does not certify the applicant, a hearing panel is then impaneled. (Rules of Procedure, Rule 4.3.) (Rules Of Procedure, rule 4.3.) (Rules of Procedure, rule 4.4.) The hearing panel consists of seven members. Four members are necessary to constitute a quorum. (Rules of Procedure, rule 5.1.) The secretary is then required to notify the applicant of a hearing date and the matters adverse to the applicant as specified by the inquiry panel. (Rules of Procedure, Rule 5.2) Following the hearing, the applicant may be certified only upon receiving at least four affirmative votes of the hearing panel. (rule 5.4(b).) If the hearing panel votes to certify an applicant, the secretary shall notify the applicant. Rules of Procedure, Rule 6.1.

Edward A. Loss was the first person whose application was processed through the inquiry panel, on whom a hearing was held by the hearing panel, under the new rules. Following the hearing, the hearing panel notified the secretary that Loss had been certified by the panel. The secretary notified the State Board of Law Examiners and Loss of the certification of

February 17, 1986. The court was notified of this certification of the hearing panel, and the matter was discussed by the court in the conference room. Following this discussion, the court informed the State Board of Law Examiners that our Rule 708(c) (107 Ill. 2d R. 708(c)) requires certification by the entire Committee on Character and Fitness, and not certification by only a majority of a seven-member hearing panel. The State Board of Law Examiners was further informed that the certification by the hearing panel did not comply with our rules. The State Board of Law Examiners then returned the certification to the Committee on Character and Fitness and requested the full Committee to consider the application. A special meeting of the Committee was held on april 14, 1986, but voting on the question of certification was not completed until April 29, 1986. The report from the secretary of the Committee on Character and Fitness and the report from the State Board of Law Examiners do not show that any meeting of the committee was held other than on April 14, 1986. A statement that "voting by the full committee was completed on April 29, 1986," indicates that voting by some members of the Committee was other than at the special meeting held on April 14, and must have been by telephone, by letter, or at least by some means other than at the meeting. The full membership of the Committee as of April 14, 1986, was 27, pursuant to an order of this court entered in June 1985. The vote of the full Committee as reported to this court was 14 in favor of certification and 13 against. Thus, it appears that all members cast their vote on the question in some manner.

The new rules of procedure for the Committee on Character and Fitness for the First District, which, as noted, were used for the first time in Loss' case, were deficient in that they contained no provision for a certification of an applicant by the full Committee on Character and Fitness as required by our Rule 708(c) (107 Ill. 2d R. 708(c)). The Committee rules contain no provisions governing voting by the full Committee on certification, or what constitutes a quorum, or the vote necessary to authorize certification by the full committee. Rule 5.4 provides that the hearing panel may, by unanimous vote of the members present at a meeting, adopt a resolution to vote by mail or telephone

on an application. There is no such provision in the rules of the Committee authorizing voting by the full Committee by mail or telephone, or in any manner other than the customary method of voting at a duly called meeting attended by a quorum.

Thus, it appears to me that the attempted certification by the full Committee reported to the court by the secretary of the State Board of Law Examiners on April 29, 1986, was also not a valid certification. Thus, all of the discussion in the dissent about not following our own Rule 708(c), which provides that after certification by the Committee, the application shall be entitled to admission, is irrelevant, as is the dissent's implication that we have violated Loss' due process rights by failing to admit him to the practice of law. Admittedly, the Committee rules are deficient and must be amended. However, Loss has suffered no constitutional deprivation by virtue of the deficiency in the rules of the Committee, because he was afforded a full hearing before the hearing panel (though not before the Committee), and the order entered by this court on June 4, 1986, provided him an opportunity to brief and argue the case before this court, based on the record that had been made before the hearing panel. The dissent complains that our June 4, 1986, order did not specify the issues that would be heard before our court. There was no need to do so. Loss had already been notified of the matters adverse to him, as specified by the inquiry panel (Rules of Procedures, Rule 5.2(b)) prior to the hearing before the hearing panel.

The majority opinion does not address the analysis that I have made herein and does not base its decision upon the fact that there had been no valid certification of Loss' fitness to practice law. I fully concur with the rationale of the majority opinion and with its holding. However, I submit this additional analysis, which supports the decision in this case. It further demonstrates that the very complicated factual question relating to the applicant's character and fitness, the confused procedural matters and the closeness of the questionable vote of the full Committee on Character and Fitness (14 for certification; 13 against) fully warranted this court's order of June 4, 1986, requesting the applicant to present and argue his case to the full court.

In his brief field in this court, Loss complains that he had no notice of or opportunity to appear before the full Committee on Character and Fitness. He argues that the Committee violated its own rules by taking his matter under consideration. This argument, of course, supports my conclusion that the irregular proceeding before the Committee on Character and Fitness justified this court in entering its order of June 4, 1986.

Was the procedural information communicated to the court by "informal communications," "gossip or rumors," or as one member of the media stated, by putting the fix in on the court? Of course not. Those are absurd characterization. This court has designated one of its members as liaison to each of its standing committees. Procedural questions and questions of policy are often communicated to the court by its committees through its liaison member of the court. The court's responses are, in turn, given to the committee through the same channel. That was the method used for communicating with the State Board of Law Examiners and the Committee on Character and Fitness concerning the procedural questions which arose in the Loss case by virtue of the new rules of procedure for the First District. When certification was made to the State Board of Law Examiners by the hearing panel, this information was communicated by the Board to the court. After discussing the matter, the court concluded that our rules require certification by the full Committee, and the Board was so informed. Naturally, there was concern about the correctness of the procedure, since, as noted, this was the first case to arise under the new rules and since this was an unusual case.

Proceedings for the admission of attorneys to the bar are not the customary adversary proceedings which are litigated in courts. The majority opinion addressed this briefly. I again wish to state that the inherent power to regulate the legal profession is vested in this court. As long as due process considerations are honored in proceedings to admit applicants, this court is not limited in its source of information. In this case, for instance, if we were prohibited from communicating with our State Board of Law Examiners or our Committee on Character and Fitness other than by receiving a certification of fitness upon filing, how would this

court have been alerted to the closeness of the vote of the full Committee, the possible irregularities in the proceedings, or even the desirability of reviewing the unusual facts of this case? Since there is no opposing party to the applicant in such proceedings, there is no adversarial way to call these matters to the court's attention other than through such reports as were received in this case.

As to the substantive information concerning Loss' moral character and fitness to practice law, the court received that from the transcript of the hearing before the hearing panel. Our Rule 709(b) (107 Ill. 2d R. 709(b)) provides that all testimony taken at such hearings shall be transcribed and transmitted to the court, if requested.

Loss seems to argue that the three-member inquiry panel found in his favor. It did not. It refused to certify him and referred his application to the full Committee for a hearing "because of the importance and complexity of the issues his case raises." the inquiry panel could have voted to certify Loss, in which event there would have been no hearing before the hearing panel. (Rules of Procedure, Rules 4.3, 4.4.) It did not vote in favor of his certification. Instead, it referred the matter to the Committee for hearing.

The dissent asserts that pursuant to our Rule 708(c) (107 Ill. 2d R. 708(c)), if the Committee on character and Fitness certifies an applicant, he is *entitled to be admitted to the practice of law* and that such certification by the Committee, the majority opinion of this court correctly points out that such a literal reading of this rule would result in an abdication of our duty to regulate the bar of this State. This rule cannot be read as conferring an absolute entitlement of admission, as urged by the dissent and by Loss. For example, nothing in rule 708(c) requires that the applicant successfully complete his bar examination, or be authorized admission on a foreign license, or be over 21 years of age. Under a literal reading of Rule 708(c) , which the dissent urges, all that is required for admission to the bar is certification by the Committee on Character and Fitness.

That, of course, is not correct. All that an applicant is entitled to, upon being approved by the Committee, is a certification by the Committee to the *State Board of Law Examiners* (not the

court) that he is of good moral character and general fitness to practice law. Our Rule 704(g) and Rule 705(e) (107 Ill. 2d Rules 704(g), 705(e)) provides that if the State Board of Law Examiners shall find that the applicant meets the requirements of our rules (bar examination or foreign license) and has received from the Committee on Character and Fitness certification of good moral character and fitness to practice law, then "the Board shall certify to the court that such applicant is qualified for admission." The Committee on Character and Fitness does not make its certification to the court, but to the State Board of Law Examiners. There is nothing in our Rule 704(g) or Rule 705(e) that says that if the applicant passes the bar examination or meets the admission on foreign license requirements and is certified by the Committee on Character and Fitness, the applicant is *entitled* to admission to the bar. All these rules provide is that in such event, the Board shall certify to the court that the "applicant is qualified for admission." The literal reading of Rule 708(c) is not consistent with the provisions of Rule 704(g) and Rule 705(e).

Furthermore, Rule 701(a) (107 Ill. 2d R. 701(a)) provides that persons *may* be admitted to the practice of law in this State if they are 21 years of age, of good moral character and general fitness, and have satisfactorily completed an examination on academic qualifications, or have met the admission on foreign license requirement.

Thus, Rule 708(c) must be ready in conjunction with the other rules governing the admission to practice law. In that event, the correct construction of Rule 708(c) is that if the Committee is of the opinion that the applicant is of good moral character and general fitness to practice law, it shall so certify to the State Board of Law Examiners *and the applicant shall thereafter be entitled to be certified to the court as qualified for admission pursuant to Rule 704(g) or rule 705(e).*

It is also argued that only in the event of the refusal of the Committee to certify an applicant may this court review the finding of the Committee on Character and Fitness. This is an erroneous assumption. It is true that there are no provisions in our

rules specifically providing for such a review when a certification has been made as to an applicant. However, as noted earlier, our Rules 709(b) provides that a transcript of the hearing before the committee shall be transmitted to the court, if required. Such a transmittal, of course, is to permit the court to review the evidence that has been presented at the hearing. If the court has no authority to review the findings of the Committee upon certification, there would be no need for the court to review the evidence. The rule does not limit the transmittal of the transcript only to cases in which the Committee refuses certification. Therefore, we must construe this rule as providing that the court may review the evidence presented before the Committee on Character and Fitness even though there has been a certification as to the qualification of the applicant.

It is true that, at least during my tenure, this court has never had the occasion to review the decisions of the Committee on Character and Fitness when it has certified an applicant. This does not mean, however, that under our rules we do not have that authority. Simply because we have never reversed such a certification does not mean that we may not do so. As stated in the majority opinion, and contrary to Loss' assertion, this court has not violated its own rule. We have never had the occasion before this case to say whether or not such authority exists under our rules, or whether the finding of the Committee on Character and Fitness is binding on the court.

The language relied upon stating that the discretion of the Committee on Character and Fitness will not be reversed unless certification has been arbitrarily *refused* was taken from cases in which there had been a refusal of certification and the question before the court was whether the refusal was arbitrary. (*In re Ascher* (1980), 81 Ill. 2d 485, 498; *In re Latimer* (1957),11 Ill. 2d 327, 330; *In re Frank* (1920), 293 Ill. 263, 264.) This language cannot be construed to mean that the court may not review the decision of the Committee when there has been a certification.

The construction we place on our rules in this opinion is not contrary to any prior holding of this court, and if Loss would have construed the language of Rule 708(c) in connection with

the other rules relating to this subject, instead of focusing on one phrase of Rule 708(c) (shall thereafter be entitled to admission to the bar), he could not have reasonably concluded that he was entitled to admission to the bar simply by certification by the Committee on Character and Fitness. In view of this, we see no due process deprivation in this case.

The majority opinion does not go into great detail in describing Loss' history of errant conduct. The conclusion of the case is that Loss is not forever precluded from admission to the bar in this State. In fact, the opinion invites him to reapply. Since Loss may someday be admitted to the bar in this State, it was thought inappropriate to unnecessarily besmirch his character by a detailed recitation of his past conduct. However, the dissent seems to depict Loss as a reformed individual, whose last arrest and errant act occurred in 1975, and segments of the media, in reporting Loss' cause, have referred to him as a reformed drug addict and petty thief. I therefore find it necessary to detail the depths of his prior degradation and, more importantly, to examine his recent conduct, which has manifested to me that he has not rid himself of his prior traits of lying, deceit, deception and fraud to the extend that I am willing to say to the people of this State that Loss is of sufficiently good moral character to practice law and to represent them in handling their most confidential, personal and valued affairs. I realize that this is a judgment call and others may not agree with my conclusion. This, however, is one of the duties that I am called upon to perform as a member of this court. After considering the evidence, my conclusion is as stated in the majority opinion.

Loss, by his own admission, to speak with charity, has had a very unsavory past. In the 1960's he was suspended from York High School at least 23 times and eventually dropped out of that school. He received his high school diploma from another school. In April 1966, Loss was arrested for committing a robbery in Maywood. The court gave him the choice of going to jail or joining the military. Loss enlisted in the Marine Corps. While in the Marines, he was absent without leave for 71 days and, while absent, he assumed the name of Edward Ashe and obtained a social security number in that name. Loss eventually turned himself in to the

Marines and told his commanding officer that he was a homosexual. He stated in his testimony before the hearing panel that this was a lie and that he lied because it was the quickest way to get out of the Marine Corps. He was given an undesirable discharge and, at the time of his discharge, he was awaiting a court-martial.

While in the Marines, he began the use of drugs which, following his discharge, led to hard-drug addiction and dependency. In his own words, " I became a bad person. I became the type of person who would steal from my friends. I exploited every friendship I had."

He spent the next four years in various colleges in the Chicago area, and graduated in December 1973. The record shows that while in college, he supported himself and his drug habit by selling drugs and by the time he graduated he was addicted to heroin. He stated in his testimony that he did not report the profits from his drug sales on his income tax return. In February 1971, he was convicted of disorderly conduct and placed on one year's supervision. Also in 1971, he was discharged from a job as a pizza delivery man for stealing money.

In March 1973, Loss was arrested for possession of heroin, cocaine and marijuana. In 1974, he was arrested in San Diego for possession of heroin. At that time he was using the name of Antonio J. Harris. He had a drivers license and other false identification papers under that name. That charge was disposed of through a plea of guilty to disorderly conduct. Also in 1974, he was arrested in Las Vegas for possession of 17 pounds of marijuana. He had obtained the marijuana in San Diego and was on his way to Illinois to sell it. The charge was subsequently dismissed. In the fall of 1974, Loss was arrested in Oak Park for possession of two pounds of marijuana. He ultimately pleaded guilty to the charge and was placed on supervision. On April 14, 1975, he was arrested in West Chicago for selling heroin. This charge was later dismissed. In the summer of 1975, he was arrested for issuing a check drawn on an account which had insufficient funds and was issued to the Sears store in Oak Brook, Illinois. He pleaded guilty to misdemeanor theft and was fined. He has never made restitution to Sears for the amount of that check. In the summer of 1975,

he was also arrested for stealing $300 through the issuance of a check to the Clark Oil Company gasoline station in Bartlett, Illinois. This charge was dismissed when the defendant pleaded guilty to possession of marijuana. He has never made restitution to the Clark Oil Company. In the winter of 1975, Loss was arrested in Schaumburg on a forgery charge. He had written a check in the amount of $57 to the Sears store in the Woodfield shopping center, and the account on which the check was drawn had insufficient funds. The check was written on an account in the name of Ronald J. Renzoni, which was the alias that Loss was using at that time. He had purchased false identification papers showing that name. He did not make restitution to Sears.

Loss testified that at the end of 1975, he went to Columbia, Missouri. As he stated, he left "to get away from a very, very bad situation. I was just, as we used to say in the streets, I was very, very hot***." In the winter of 1975, he was arrested in Columbia, Missouri, on a charge of aggravated assault. He was drunk and had threatened a clerk at a convenience store with a knife. At the time of his arrest, he was living under the name of Edward Casper LaVito. Also while in Columbia, Missouri, he began drinking alcohol excessively.

In late 1975, Loss moved to Colorado, where he worked at odd jobs. In August 1977, he began working for Yankee Creek Gun Works in Evergreen, Colorado. While working there, he assumed the name of F. Ralph Murdock. While working for this organization he worked himself up to chief operating officer. Also, while in this employment, he rid himself of his drug addiction. It was during this period, he contends, he began to reform.

He had previously been married and divorced three times, and while in Colorado he contacted a former girlfriend in Chicago. She came to Colorado and they were married. He entered a hospital in Denver for alcoholism treatment in 1979, and in early summer of 1980, he returned to Chicago and surrendered to authorities on a pending criminal charge.

In December of 1980, Loss submitted an application for admission to the DePaul University College of Law. One of the questions required that he list convictions of any crimes. He listed only his conviction of his 1973 Oak Park possession of marijuana charge. He failed to reveal other conviction or to refer to his other arrests.

Also on the DePaul application, he was required to state whether he had ever been discharged from any employment from conduct reflecting on his character. He answered "no." His answer was false, because he had been fired from jobs in 1964 and in 1971 for stealing money and merchandise from employers.

Another question on the DePaul application asked if he had been employed during the academic year as an undergraduate. He stated that he had worked 40-plus hours per week as a landscaper and tree surgeon. That was untruth. He was not a landscaper and had not worked in that capacity while in college. Instead, during college his principal employment was that of a drug dealer. In listing his last three positions of full-time employment on the application, he stated that he began working for Yankee Creek Gun Works, Inc., on January 20, 1974. This also was not true. He did not begin working for that organization until August of 1977. The questionnaire also asked the applicant to list the periods of time, of a greater duration than four months, when he was not employed or in attendance at an education institution. He answered "none." This answer was false.

Not only did Loss lie in answering the questions, but he also embellished these falsehoods by attaching a letter to the application for admission in which he stated, "I might add that I did all the aforementioned, got good grades and worked no less than forty hours per week." He did not work 40 hours per week during the period of time referred to. He then was engaged in the occupation of selling drugs. Also in the letter, he stated he traveled around the United States for six months or so then joined the Yankee Creek Gun Works, Inc., in 1974, which, as noted earlier, was false. He did not mention the impressive assault which he compiled during that period. Loss testified that these false statements on the application for admission to law school were

deliberate lies, because he wanted to present himself in the best light possible in order to get into law school.

In the spring of 1981, Loss filed his 1980 Federal and Colorado income tax returns and signed them in the name of F. Ralph Murdock, and he used the social security number that he had obtained for Murdock on the returns. At the hearing before the hearing panel, he stated that he had filed his 1981 and 1982 income tax returns under the name of Edward Loss. Although he was requested to produce copies of those returns, he had not done so at the time of the hearing before the hearing panel, and he had not done so by August 7, 1986, the date that the brief of the Attorney Registration and Disciplinary Commission was filed in this court.

In June of 1981, Loss applied for a student loan at the First National Bank of Chicago. On the loan application he stated that his current employer was Home Environmental Services. This statement was false. He was not employed by that organization. This was an organization owned by his brother. He testified that he was not working for his brother at that time and the reason for that lie was to get a student loan.

Loss drank heavily while he was in law school, and in December of 1984, he voluntarily hospitalized himself for about a week because of his drinking problem. He contends that he has conquered this habit except for an occasional slip.

The statement in the majority opinion that Loss was less than candid on his application for law school, and that the application contained answers that were less that accurate, was simply a kind way of stating that Loss was an outright liar. He admitted at the hearing before the hearing panel that he lied in order to put himself in the best light possible so that he would be admitted to law school. I am not concerned about Loss' past history of drug and alcohol abuse. He claims that he has overcome those habits, which is to his credit, and he is to be commended. I am also not concerned about his past criminal activities. These , as was his drug habit, may well have been the product of a misspent youth.

What I am concerned about is Loss' propensity for lying. He lied whenever it was necessary to do so to achieve a desired end. He has demonstrated no commitment to the truth. To him, lying was simply a matter of convenience. He lied to the Marine Corps because it was the quickest way to acquire a discharge. He lied about his identity when his convenience required it, using at least nine aliases over a period of 14 or 15 years. His application for admission to DePaul Law School was an outrageous series of lies, which he admitted was for the purpose of gaining admission. He lied on his application for a student loan for the sole purpose of obtaining the loan. This propensity to lie was not manifested only during his errant youthful years. The Marine Corps episode occurred when he was 19 or 20 years old. He was about 34 years old when he lied on his law school application, and on his application for a student loan. These lies with regard to his law school application and the loan application occurred after he claims he had turned his life around.

He has thus presented to us a history of about 15 years of lies and deceit. He now contends, however, on his application to the Committee on Character and Fitness, that he has been completely truthful in revealing his sordid past. Even if that is the case, and I will discuss that later, we must consider whether we should permit a person to perpetrate a fraud on a law school in order to be admitted, and then later, when applying for admission to the bar, to admit that he had been a liar and be forgiven.

To me, being truthful in answering the Committee on Character and Fitness questionnaire is not a manifestation of the reform, for not lying on the application for admission to the bar, which was not present when applying for admission to law school. This court has held that making material false statements on a bar application is grounds for imposing sanctions. (*In re Mitan* (1979), 75 Ill. 2d 118.) In fact, in *Mitan*, we noted that recent cases from other jurisdictions recommend disbarment for such conduct. (75 Ill. 2d 118, 127.) Thus, the incentive for being truthful in answering the questionnaire for admission to the bar was to avoid disciplinary action against him at some future date, when these misrepresentations may have come to light. We should not encourage such deceit perpetrated upon our law schools by admitting

those who brazenly lie on their applications for admission to such schools, absent a strong showing of rehabilitation. I do not consider that truthfully answering questions on the bar application, in view of the consequences of answering them falsely, to be very strong evidence that the liar has reformed.

Addressing now Loss' answers to the application for admission to the bar, we note that even there he was not as candid as he professes to have been. One question asked if he had ever been dropped, suspended, placed on probation, disciplined or expelled from any school, college, law school or other similar institution, or if he had been accused of any dishonesty in connection therewith. Loss answered "no." Nothing was said by him about his 23 suspensions from York High School. Also, he did not list or give information concerning his employment by several employers. These answers do not constitute material misrepresentation so as to warrant his discipline after being admitted to practice, but they do reflect the continued existence of his inability to be truthful.

The dissent makes light of the reference in the majority opinion to Loss' recent divorce and asks how that fact is relevant to this fitness to practice law. This fact must be considered in connection with the fact that Loss had been married and divorced three times previously. At the hearing before the hearing panel, a witness testifying on behalf of Loss who professed to have some experience and knowledge in the area of social rehabilitation, stressed as an example of Loss' rehabilitation the satisfactory relationship between Loss and his wife and family. In the written brief and argument submitted to the hearing panel by his attorney, Loss' "stable family life" is noted as an indication of his rehabilitation. The divorce referred to in the majority opinion indicates the stable family life has fallen apart and this factor, which was held up as an indicia of rehabilitation before the hearing panel, has vanished. This is its relevance.

The dissent also construes the letter Loss wrote to the court, after the entry of our order of June 4, 1986, in which we decided to hear oral arguments on his application, as not being misleading. In that letter, Loss stated that absent the allowance by the court

to him of costs and fees or *pro bono* intervention, "I am *unable* to continue to prosecute this case." (Emphasis added.) Although this may not be characterized as a claim of indigency, and may not, *per se*, be proof of an intent to defraud the court, it is a representation to this court that without outside help, Loss was financially *unable* to participate in the court proceedings. Based upon this representation, this court authorized the payment of Loss' attorney fees. However, an application for a mortgage loan signed May 15, 1986, about three weeks before Loss' letter to this court, as noted in the dissenting opinion, showed that he had a net worth at that time of at least $125,000. (There is some question about the correctness of the compilation of the net worth on the form which shows $209,000 in assets, and $13,000 in liabilities. It appears that the liabilities may have been $84,000.) Also, verifications of employment submitted to the mortgage company at that time show that Loss' income for the year of 1985 was $51,200, and that his wife's was $20,311, and beginning July 1, 1986, she would be paid $28,000 per year. Under these circumstances, I view Loss' representation that he was financially *unable* to continue this litigation to be inaccurate and manifests to me that some of his prior traits remain.

The fact that Loss has conquered his drug and alcohol dependency, that he had a good record in law school, and that he has helped ex-convicts and drug addicts rehabilitate are all admirable accomplishments. However, in view of his past propensity to lie, in determining his fitness to practice law we are faced with considerations beyond these accomplishments. As stated by one member of the hearing panel when questioning Loss about his past record: "Why could the inference not be drawn that faced with unfavorable reality, you would also lie to a client or court?"

I am not satisfied in my own mind that Loss, who, over a period of 15 years, lived a life of lies and deceit, should be permitted to practice law. Under the circumstances of this case, I am not prepared to say that the records shows that he has divested himself of his past undesirable traits. I cannot, in good conscience, say to the people of this State that Edward A. Loss will be a lawyer who will deal with you and the public honestly, and in whom

you can put your trust. Others may disagree. This is their prerogative.

It is difficult to understand public reaction. As a result of the ongoing Federal investigation into corruption in the circuit court of Cook County, the media and the public soundly condemned the legal profession for harboring too many crooks and cheats. Yet, when a majority of this court attempts to keep a person, whom it thinks will not ethically perform, from becoming a lawyer, the public permits itself to be manipulated into reading sinister motives into our action. Led on by irresponsible statements by segments of the media, members of the public have, in communications to this court, expressed outrage and charged that there has been an outright "fix." Such charges have even been directed at a member of the court who did not participate in this decision. The same irresponsible segments of the media and the same members of the public would no doubt complain just as bitterly if we were to admit Loss to the practice of law, and if he, through lies and deception, were to deprive someone of this liberty or property.

I regret that the unsatisfactory, accusatory language of the dissenting opinion has precipitated this needless controversy.

CLARK, C.J., and MORAN and MILLER, JJ., join in this special concurrence.

APPENDIX C

Stay of Mandate

APPENDIX C

Stay of Mandate

* * * * *

IN THE
SUPREME COURT OF ILLINOIS

In re:	)	
	)	
EDWARD A. LOSS III,	)	Number: M.R. 3972
	)	Administrator's No. 85ML6
Petitioner.	)	

MOTION TO STAY MANDATE

Now comes the Movant, EDWARD ANTHONY LOSS III, by and through his Attorney, WILLIAM J. HADDAD, and moves this Honorable Court pursuant to Rule 368(c) of the Rules of this Court to Stay the Mandate in this cause pending the filing of a timely Petition for *Certiorari*.

William J. Haddad
Attorney for Loss

William J. Haddad
Attorney at Law
155 North Michigan Avenue
Suite 700
Chicago, Illinois 60601
(312) 856-1114

APPENDIX D

Notice of Appeal

APPENDIX D

Notice of Appeal

* * * * *

IN THE
SUPREME COURT OF ILLINOIS

In re:	)	
	)	
EDWARD A. LOSS III,	)	Number: M.R. 3972
	)	Administrator's No. 85ML6
Petitioner.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that EDWARD A. LOSS III, the Petitioner above-named, hereby appeals to the Supreme Court of the United States the final order entered in this action on August 17, 1987, denying LOSS admission to the bar of the State of Illinois. This appeal is taken pursuant to 28 U.S.C. Sec. 1257 and the Due Process and Equal Protection Clauses of the United States Constitution.

William J. Haddad
Attorney for Edward A. Loss III
155 North Michigan Avenue
Suite 700
Chicago, Illinois 60601

APPENDIX E

Order of the Illinois Supreme Court
June 4, 1986

APPENDIX E

Order of the Illinois Supreme Court
June 4, 1986

* * * * *

IN THE
SUPREME COURT OF ILLINOIS

In re:	)	
	)	
EDWARD A. LOSS III,	)	Number: M.R. 3972
	)	

ORDER

It appearing to the Court that the Character and Fitness Committee for the First District, under Rule 708, filed with the Board of Law Examiners, a statement certifying that Edward Loss III is in its opinion of good moral character and general fitness to practice law and that the Board of Law Examiners recommended to the Court that said Edward Loss III be admitted to the bar of Illinois, the Court, upon review of *the extraordinary circumstances brought out at* the hearing before the Character and Fitness Committee, is unable to say that Edward Loss III has satisfactorily established that he is of good moral character and general fitness.

The Court cannot abdicate its responsibilities regarding admission to the bar. Leave is given said Edward Loss III to file not later than June 16, 1986, a petition for admission to the bar of Illinois, addressing the question of character and fitness.

Carl Rolowick, Administrator of the Attorney Registration and Disciplinary Commission, shall designate John Holtaway or another Commission attorney to file a response to the aforesaid petition not later than June 23, 1986.

Oral argument on the petition shall be held on June 25, 1986, as the first case on call.

Simon, J., dissenting.

IN RE EDWARD LOSS III

JUSTICE SIMON, dissenting:

I dissent form the extraordinary order issued by the court in this case. That order requires Edward Loss, who has been certified to this court by the Board of Law Examiners as qualified for admission to the practice of law in Illinois under Supreme Court Rule 704(g) (81 Ill. 2d (1980) R. 704 (g), to file a petition in this court "addressing the question of character and fitness."

This court enjoys a general grant of authority to license attorneys to practice law in this State under section 1 of chapter 13 of the Illinois Revised Statutes (Ill. Rev. Stat. 1985, ch. 13, par. 1). The court's licensing procedures are subject, however, to constitutional guarantees of due process and equal protection. The rules promulgated by the court to govern the exercise of its licensing authority (Ill. Rev. Stat. 1985, ch. 110A, par. 701 *et seq.*) are designed to ensure, so long as those rules are applied in every case, that licensing decisions are not arbitrary and capricious, but meet constitutional due process standards.

Rule 708(c) states:

"(c) If the [C]ommittee [on Character and Fitness] is of the opinion that the applicant is of good moral character and general fitness to practice law, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be *entitled* to admission to the bar. If the committee is not of that opinion, it shall file with the Board of Law Examiners a statement that it cannot so certify, together with a report of its findings and conclusion." (Emphasis added.) (73 Ill. 2d (1979) R. 709(c).) The rule

specifically states that an applicant is *entitled* to admission to the bar where, as here, the Committee on Character and Fitness (Committee) has certified to the Board of Law Examiners (Board) that the applicant is of good moral character and general fitness to practice law.

Rule 704(g) states:

"(g) In the event the Board of Law Examiners shall find that [an] applicant meets the requirements of these rules, and has received from the Committee on Character and Fitness its certification of good moral character and general fitness to practice law, the board shall certify to the court that such applicant is *qualified* for admission." (Emphasis added.) (81 Ill. 2d (1980) R. 704(g).)

This rule specifically states that an applicant is *qualified* for admission to the bar where, as here, the Board finds that he meets the requirements of Rules 701, 703, and 704, and the Committee has certified him. Read together, Rules 704(g) and 708(c) expressly state that an applicant who meets the requirements of those rules is both *qualified* for and *entitled* to admission to the bar. Mr. Loss has met those requirements.

Nevertheless, the court has decided to review the Committee's finding that Mr. Loss is of good moral character and general fitness to practice law. I can find no authority for this procedure. There is no provision in our rules that permits the court to review the Board's finding that a candidate meets the requirements of the rules, to review the Committee's findings of good character and fitness, or to refuse admission to a candidate who, in accordance with this court's own rules, has been certified as qualified for and entitled to admission under those rules.

This is apparently the first time the court has seen fit to review a decision by the Committee to certify a candidate for admission. This procedure not only ignores our own rules, but it also contradicts our own case law stating that the court will not review the Committee's exercise of its discretion "except in the unlikely event that there has been an arbitrary refusal of a certificate."

(In re Latimer (1957), 11 Ill 2d 327, 330, *appeal dismissed*, 355 U.S. 82, 2 L. Ed. 2d 111, 78 S.Ct. 153.) Such a refusal would, of course, require review by this court, because it would raise the question of a violation of the applicant's constitutional rights.

This court has stated that the Committee "is an arm of this court" (11 Ill. 2d 327, 330) and has delegated its authority to determine the issue of an applicant's character and fitness to the members of the Committee acting as commissioners of this court (see 73 Ill. 2d R. 709 (b)), with *review* limited to cases involving an *arbitrary refusal* of a certificate. Moreover, "[i]t is well established that the exercise of discretion by a committee on character and fitness *** will not be *reversed* by this court unless the certification has been *arbitrarily refused*." (Emphasis added.) *In re Ascher* (1980), 81 Ill. 2d 485, 498.

The present case involves neither the refusal of a certificate nor an arbitrary decision. A sub-committee appointed by the Committee held a full and thorough hearing at which Mr. Loss appeared and testified extensively. Both Mr. Loss and the Committee were represented by able counsel and all witnesses were subject to probing cross-examination by both the Committee's counsel and members of the sub-committee. In light of the evidence in the record of the careful consideration given to both the positive and negative aspects of the applicant's history, the decision to certify the applicant for admission can scarcely be viewed as arbitrary. Thus, any argument that symmetry requires the the court review the Committee divisions to certify as well as refusals to certify must fail in this case, because symmetry would also limit review to arbitrary decisions, and the decision in this case was clearly not arbitrary. Moreover, the reason for reserving review of refusals to certify, namely the danger of a violation of the candidate's constitutional rights to due process and equal protection, is not present where the Committee decision is to certify.

This view is supported by Rule 708 (d), which states:

"(d) An applicant who has availed himself of his full hearing rights before the Committee on Character and Fitness and who

deems himself aggrieved by the determination of the committee may, on notice to the committee, petition the Supreme Court for relief." (81 Ill. 2d (1980) R. 709 (d)).

The rule provides a procedure for occasions when the Committee refuses to certify a candidate, but is silent regarding the review of a Committee decision to certify. Clearly the court did not contemplate such a review when these rules were drawn. Rather, it entrusted to the Committee authority to determine the issue of the character and fitness of applicants. If the court wishes to change its rules to permit such a review, it may do so in the customary manner. What it may not do, however, is ignore its rules and all previous case law in this single case, after the candidate has completed the application process and the Committee and Board have discharged their duties under the existing rules. Failure to follow these rules offends the very concept of fair play, and this due process cannot countenance.

State of Illinois
Supreme Court

I, JULEANN HORNYAK, Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and Seal thereof do hereby certify the foregoing to be a true copy of an order entered by the Supreme Court on June 4, 1986, in a certain cause entitled:

In re:	)	
	)	
EDWARD A. LOSS III	)	
	)	M.R. 3972
	)	

filed in this office on the 4th *day of* June *A.D.* 1986

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said court this 4th day of June 1986

/s/ Juleann Hornyak, *Clerk,*

Supreme Court of the State of Illinois.

APPENDIX F

Rules Provisions Involved

APPENDIX F

Rules Provisions Involved

* * * * *

Illinois Supreme Court Rules on "Admission and Discipline of Attorneys", Chapter 110A, *Illinois Revised Statutes*,Section 701 *et seq.* (eff. May 15, 1980):

Supreme Court Rule 701(a). **General Qualifications**

> Persons may be admitted to practice law in this State by the Supreme Court if they are at least 21 years of age, of good moral character and general fitness to practice law, and have satisfactorily completed an examination on academic qualification and... completed an examination on professional responsibility conducted by the Board of Law Examiners or have been licensed to practice law in another jurisdiction and... have satisfactorily completed a professional responsibility examination, subject however, to the requirements contained in these rules.

Supreme Court Rule 704. **Qualification on Examination**

> (g) In the event the Board of Law Examiners shall find that such applicant meets the requirements of these rules, and has received from the Committee on Character and Fitness its certification of good moral character and general fitness to practice law, the board shall certify to the court that such applicant is qualified for admission.

Supreme Court Rule 708. **Committee on Character and Fitness**

> (a) At the November term of each year, the Supreme Court shall appoint a Committee on Character and Fitness in each of the judicial districts of this State, consisting of not less than three members of the bar. The members of the Board of Law Examiners shall be *ex-officio* members of the committees.